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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FLEMING SUPERMARKETS OF FLORIDA, INC.,
Petitioner,

v.

WALTER DAMON AND RICHARD KANAFANI,
Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a five year age difference meet the "substantially younger" element necessary to establish a prima facie case under the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioner, Fleming Supermarkets of Florida, Inc., a Florida corporation, states that it is a wholly owned subsidiary of Fleming Companies, Inc., a publicly held Oklahoma corporation. There are no subsidiaries of Fleming Supermarkets of Florida, Inc.

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PETITION FOR WRIT OF CERTIORARI

Fleming Companies of Florida, Inc. ("Fleming") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit entered in this proceeding on December 3, 1999, in order to resolve the conflict between the Eleventh Circuit on the one hand and the Seventh, Sixth, Eighth and Fourth Circuit Courts of Appeals on the other hand on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was reported at *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354 (11th Cir. 1999) and is reprinted in the Appendix hereto at pages App. 1 through 23.

JURISDICTION

The decision of the Court of Appeals was entered on December 3, 1999. Petitioner timely files this Petition under 28 U.S.C. § 1651; U.S. Sup.Ct. Rule 10. Review should be granted pursuant to Rule 10(a) of the United States Supreme Court because the United States Court of Appeals for the Eleventh Circuit entered an order in conflict with decisions of other United States courts of appeals on the same important issue.

STATUTES INVOLVED IN THIS CASE

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or **to discharge any individual** or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employer, **because of such individual's age**;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE[1]

Plaintiffs below, Walter Damon and Richard Kanafani ("Kanafani"), are former employees of Fleming Supermarkets of Florida, Inc. Plaintiffs brought an action in the United States District Court for the Southern District of Florida for alleged age discrimination. Jurisdiction in the District Court was based on 28 U.S.C. § 1331. App. 25.

[1] Unless otherwise indicated, all emphasis is supplied.

The District Court granted final summary judgment in favor of Defendant Fleming. App. 41-42. Plaintiffs appealed and the Eleventh Circuit Court of Appeals reversed. App. 1-23. Fleming brings this petition for a writ of certiorari on the single issue of whether Plaintiff Kanafani presented the District Court with sufficient evidence to establish a prima facie case of age discrimination, in light of the fact that Kanafani was replaced by someone only five years younger.

Kanafani was employed by Fleming from September 1993 until his employment was terminated on October 6, 1994. Kanafani was forty-two years old at the time of his discharge and was replaced by Tony Calveiro who was thirty-seven years old. *See Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354 at 1360, App. 7.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Opinion Directly Conflicts With Decisions of Other Circuit Courts of Appeal

In evaluating age discrimination claims based on circumstantial evidence, most circuits apply a variant of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) analysis similar to that used by the Eleventh Circuit in this case. *See Damon* at 1359, App. 4, 6-7. Applying this framework, a plaintiff must satisfy a four-part test to establish a prima facie case:

> (1) that [the plaintiff] was a member of the protected group of persons between the ages of forty and seventy; (2) that she was subject to

> adverse employment action; (3) that a **substantially younger** person filled the position that she sought or from which she was discharged; and (4) that she was qualified to do the job for which she was rejected.

Id.

This petition involves the important question: "What age differential constitutes 'substantially younger' under the third prong of the test?"

This Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), stated: "[I]n the age-discrimination context, [an inference of illegal discrimination] cannot be drawn from the replacement of one worker with another worker **insignificantly younger**." The Court explained: " . . . because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.*

The Court left unresolved, however, the issue of what age difference constituted "insignificantly younger" or "substantially younger", but noted that a three year difference (sixty-eight versus sixty-five) provided "very thin evidence" of discrimination. *Id.* at 312.

Since *O'Connor* the Circuits have conflicted in their interpretation of the meaning of "substantially younger." In this case, the Eleventh Circuit reaffirmed its position that a three year age difference is sufficient to establish the "substantially younger" element and held a five year difference was sufficient:

> . . . both the Appellees and the district court, in dicta, suggest that Kanafani did not meet [the "substantially younger"] requirement because, at the time of Kanafani's termination, his replacement was thirty-seven, while Kanafani was only forty-two. We disagree. Previously, we have held that a replacement who is only three years younger is sufficient to establish a prima facie case. *See Carter v. Decision One Corp.*, 122 F.3d 997, 1003 (11th Cir. 1997) (holding that plaintiff aged 42, who was replaced by employee aged 39, met the "substantially younger" replacement requirement under ADEA) (*citing Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir. 1989)). Here, there is a five year age difference between Kanafani and his replacement. We therefore find that Kanafani has satisfied the "substantially younger" replacement requirement.

See Damon, 196 F.3d at 1360, App. 7.

The Eleventh Circuit's opinion on this issue is in direct conflict with decisions from other United States circuit courts of appeals. The Seventh, Sixth, Eighth, and Fourth Circuit Courts of Appeals have found that an age difference of five years or more does not meet the "substantially younger" test. *See e.g., Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1029 (7th Cir. 1998) (holding that a forty-five year old replacement was not "substantially younger" than the fifty-two year old plaintiff, therefore, plaintiff has failed to establish a prima facie case); *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997) (holding that a six or seven year age difference did not demonstrate a prima facie case, stating: "[t]en years is a

reasonable threshold establishing a 'significant' and 'substantial' gap, which is what *O'Connor* demands"); *Bush v. Dictaphone Corp.*, 161 F.3d 363, 368 (6th Cir. 1999) (affirming district court decision which held that an employee failed to establish a prima facie case in a wrongful demotion action where he was forty-six and his replacement was forty-one); *Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407, 1413 (8th Cir. 1997) (holding the "largest age disparity between [Plaintiff] and the individual hired for the job was five years . . . the age disparities do not raise an inference of discrimination" in that the individuals hired were not substantially younger); *Cramer v. Intelidata Technologies Corp.*, 168 F.3d 481 (4th Cir. 1998) (affirming the district court's analysis that, when an employee is replaced by a person "only five years younger," that person, in the absence of additional information, is not "substantially younger" than the replaced employee).[2]

In fact, since this Court's decision in *O'Connor*, only one circuit, the Eleventh, has held that fewer than ten years is "sufficiently younger" to establish a prima facie case for age discrimination. Other circuits (Sixth, Eighth, and Fourth Circuits) have held that five years or less than ten years (Seventh Circuit) does not satisfy the "substantially younger" element under the *O'Connor* analysis to establish a prima facie case of age discrimination. This conflict among the United States Circuit Courts of Appeals creates the confusing and inequitable situation in which the outcome of the case is determined by the Circuit in which the plaintiff files his or her claim.

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[2] *Cramer v. Intelidata Technologies Corp.*, is an unpublished Fourth Circuit Court of Appeals decision.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant its Petition for a Writ of Certiorari so that this conflict among the circuits may be fully briefed and resolved by the Court.

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Walter DAMON, Richard Kanafani,
Plaintiffs-Appellants,

v.

FLEMING SUPERMARKETS OF FLORIDA, INC., f.d.b.a. Wooley's Fine Foods, etc.,
Defendant-Appellee.

No. 98-5554.

United States Court of Appeals,
Eleventh Circuit.

Dec. 3, 1999.

Scott Walter Rothstein, Michael Anthony Pancier, Ft. Lauderdale, FL, for Plaintiffs-Appellants.

Joseph Lester Rebak, Miami, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON and MARCUS, Circuit Judges, and ALARCON*, Senior Circuit Judge.

MARCUS, Circuit Judge:

In this age discrimination suit, Appellants Walter Damon and Richard Kanafani appeal from an order of the district court granting summary judgment in favor of the defendant, Fleming Supermarkets of Florida, Inc. d/b/a Hyde Park Markets, f/d/b/a Wooley's Fine Foods ("Fleming"). Damon and Kanafani brought this action

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

against Fleming, their former employer, alleging violations of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, and the Florida Civil Rights Act of 1992, Fl.Stat.Ann. §§ 760.01-760.11. The district court concluded that neither plaintiff had established a prima facie case of age discrimination, nor, in the alternative, had demonstrated that the legitimate nondiscriminatory reasons proffered by Fleming for their terminations were a pretext for age discrimination. We disagree, finding material facts in dispute. Accordingly, we reverse the order of summary judgment and remand for trial.

I.

We review a district court's order granting summary judgment de novo. *Browning v. AT&T Paradyne*, 120 F.3d 222 (11th Cir.1997). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir.1991) (en banc) (citation omitted). In making this determination, we review the record, drawing all reasonable inferences in the light most favorable to the nonmoving party. *See Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir.1996).

II.

The facts presented are reasonably straightforward. Fleming, a nationwide supermarket chain, acquired twenty South Florida supermarket stores in September 1993 from Pantry Pride (d/b/a Wooley's Fine Foods). It immediately installed Harry Soto as district manager of seven of the stores. At the time, Appellants Walter Damon and Richard Kanafani were store managers at two of the stores acquired by Fleming. Each of their stores was placed under the direct supervision of Soto. The undisputed evidence demonstrates that, within a period of slightly over one year after assuming the position of district manager, Soto terminated or demoted five older, more experienced managers, including Damon and Kanafani, and replaced them with men who were younger and less experienced. The older managers were all over forty, and the younger managers were all under forty. Soto himself acknowledged that this pattern occurred. No evidence was presented by Fleming that any younger managers were terminated by Soto while he was district manager. Damon was fired for alleged poor performance. Kanafani was fired for allegedly yelling profanities at an employee on the sales floor.

III.

In its September 16, 1998 summary judgment order, the district court made several pertinent conclusions of law. First, the district court reasoned that Appellants had not established all the elements of a prima facie case of age discrimination. Specifically, the district court found that Damon and Kanafani neither established that they

were qualified for their positions under the *McDonnell Douglas* rubric nor proffered direct evidence of discrimination by Fleming. The district court also suggested in dicta that Kanafani had failed to establish that he was replaced by someone substantially younger because, at the time of his termination, Kanafani was forty-two and his replacement was thirty-seven. Finally, the district court concluded that Appellants did not establish that the nondiscriminatory reasons Fleming offered for the terminations were a pretext for age discrimination. We discuss each conclusion in turn.

A. Prima Facie Case

In proving an age discrimination claim, a plaintiff can establish a prima facie case of discrimination through either direct evidence of discrimination or a variation of the four-part test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) for circumstantial evidence. *See Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir.1989) Appellants' claims rely on both methods.

1. Direct Evidence of Discrimination

We agree with the district court that neither plaintiff has presented direct evidence of age discrimination. We have defined direct evidence of discrimination as evidence which reflects " 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.' " *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir.1998) (*quoting Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th

Cir.1990)). In other words, the evidence must indicate that the complained-of employment decision was motivated by the decision-maker's ageism. As a result, "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age" will constitute direct evidence of discrimination. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081-82 (11th Cir.1990) (citations and quotations omitted); *see also City of Miami*, 870 F.2d at 582. An example of "direct evidence would be a management memorandum saying, 'Fire Earley – he is too old.' " *Earley*, 907 F.2d at 1082. No evidence presented by Appellants meets this rigorous standard.

The most probative piece of alleged direct evidence cited by Appellants is a comment by Soto to Dennis D'Angelo, Kanafani's replacement, immediately after Kanafani's termination that "what the company needed was aggressive young men like [D'Angelo] to be promoted."[1] While the statement was made right after

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[1] In addition to this comment, Appellants also rely on an alleged comment by Soto that he wanted "a younger influx of blood." There is no record evidence that Soto ever made this comment. The only evidence of this comment is double hearsay testimony from a co-worker, Charlie Guerra, that another employee, Justo Varela, overheard the comment at a store meeting and told Guerra about it. Varela avers in an affidavit that he never heard the comment nor told Guerra about the alleged comment. Guerra did not hear Soto make the comment, and was not even present at the meeting in question. This comment is inadmissible double hearsay, and we refuse to consider it as probative evidence. *See Zaben v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1455-57 (11th Cir.1997). Finally, Appellants rely on Soto's admission that, under his direction, there was a pattern of firing or demoting older managers, and replacing them with younger managers. While probative

Kanafani's termination, and it was made by Soto, the decision-maker, to Kanafani's younger replacement, the comment does not amount to direct evidence of discrimination. Though probative circumstantial evidence of Soto's state of mind, the comment still requires us to infer that Soto's interest in promoting young men motivated his decision to terminate Kanafani. In similar instances, our court has refused to classify such comments as direct evidence of discrimination. *See, e.g., Beaver v. Rayonier Inc.*, 188 F.3d 1279, 1285-86 (11th Cir.1999) (finding that decision-maker's comment that he wanted to attract "younger, engineer-type employees or supervisors" in reduction-in-force case did not rise to level of direct evidence of discrimination); *Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390, 1393-94 (11th Cir.1997) (holding that evidence which suggests, but does not prove, a discriminatory motive, is circumstantial evidence by definition). We therefore conclude that the district court correctly found no direct evidence of age discrimination.

2. Circumstantial Evidence of Discrimination

In evaluating age discrimination claims based on circumstantial evidence, we require a plaintiff to initially satisfy a four-part prima facie requirement: (1) that she was a member of the protected group of persons between the ages of forty and seventy; (2) that she was subject to

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circumstantial evidence, this pattern is not direct evidence of discrimination because it does not directly establish that Soto's termination decisions were motivated by age bias.

adverse employment action; (3) that a substantially younger person filled the position that she sought or from which she was discharged; and (4) that she was qualified to do the job for which she was rejected. *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir.1998) (citations omitted).

We conclude that both Appellants established prima facie cases of age discrimination. First, there is no dispute that Appellants satisfied the first two requirements. Both Appellants are members of the protected group and were subjected to adverse employment actions. As for the third element, Appellees concede that Damon satisfied the third requirement in that he was replaced by someone "substantially younger." However, both the Appellees and the district court, in dicta, suggest that Kanafani did not meet this requirement because, at the time of Kanafani's termination, his replacement was thirty-seven, while Kanafani was only forty-two. We disagree. Previously, we have held that a replacement who is only three years younger is sufficient to establish a prima facie case. *See Carter v. DecisionOne Corp.*, 122 F.3d 997, 1003 (11th Cir.1997) (holding that plaintiff aged 42, who was replaced by employee aged 39, met the "substantially younger" replacement requirement under ADEA) (*citing Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir.1989)). Here, there is a five year age difference between Kanafani and his replacement. We therefore find that Kanafani has satisfied the "substantially younger" replacement requirement.

Finally, we conclude that Kanafani and Damon were "qualified" for their respective positions, satisfying the

fourth and final prima facie requirement. In age discrimination cases, our court focuses on a plaintiff's "skills and background to determine if they were qualified for a particular position." *Clark v. Coats & Clark*, 990 F.2d 1217, 1227 (11th Cir.1993). Our precedent holds that if a plaintiff has enjoyed a long tenure at a certain position, we can infer that he or she is qualified to hold that particular position. *See id.* (inferring a plaintiff's job qualifications from his 25 years of experience); *Pace v. Southern Railway System*, 701 F.2d 1383, 1386 n. 7 (11th Cir.1983) (finding that "where a plaintiff has held a position for a significant period of time, qualification for that position, sufficient to satisfy a prima facie case, can be inferred"). Based on the employment history of Damon and Kanafani, we can infer that they were qualified for their respective positions. Appellants were store managers for more than a decade, and, by all accounts, had performed their jobs with distinction during the bulk of that period. Damon held the position of store manager for 34 years, and consistently received numerous awards, commendations, and merit raises. Kanafani was a store manager for 13 years, and also received his share of bonus awards and merit raises.

In finding the Appellants unqualified, the district court incorrectly considered Fleming's allegations of Appellants' poor performance. Our caselaw quite clearly instructs that plaintiffs, who have been discharged from a previously held position, do not need to satisfy the *McDonnell Douglas* prong " 'requiring proof of qualification.' " *Young v. General Foods Corp.*, 840 F.2d 825, 830 n. 3 (11th Cir.1988) (*quoting Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1495 n. 2 (11th Cir.1987)). We

have explained that the " 'reason for this modification [of *McDonnell Douglas*] is that in cases where a plaintiff has held a position for a significant period of time, qualification for that position sufficient to satisfy the test of a prima facie case can be inferred.' " *Young*, 840 F.2d at 830 n. 3 (*quoting Rosenfield*, 827 F.2d at 1495 n. 2). We also have unambiguously held that allegations of poor performance against plaintiffs discharged from long-held positions may be properly considered, only after a prima facie case has been established, when a court evaluates the pretextual nature of an employer's proffered nondiscriminatory reasons for termination. *See Clark*, 990 F.2d at 1227 (holding that evidence of employee's performance reprimands does not establish that employee was unqualified, but may indicate company was legitimately concerned about employee's performance); *Young*, 840 F.2d at 830 n. 3 (same). The district court therefore erred in concluding that Appellants were not "qualified" based on Fleming's allegations of poor performance.

B. Pretext

Having concluded that Appellants met their prima facie burdens, we turn to the remaining issue of pretext. Once a prima facie case is established, a defendant must proffer legitimate, nondiscriminatory reasons for its employment decision. If such reasons are identified, a plaintiff then bears the ultimate burden of proving them to be a pretext for age discrimination. *See Turlington*, 135 F.3d at 1432. We have repeatedly and emphatically held that a defendant may terminate an employee for a good or bad reason without violating federal law. *See Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir.1991).

We are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision. *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir.1984). In this case, Fleming clearly offered legitimate, nondiscriminatory reasons for terminating Damon (poor performance), and Kanafani (yelling vulgarities in front of customers). Therefore, Appellants bore the burden of offering enough probative evidence so that a reasonable jury might conclude that Fleming's reasons for termination were a pretext for age discrimination. *See Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 658 (11th Cir.1998). In the summary judgment context, we conduct this inquiry by determining whether a jury "could reasonably infer discrimination if the facts presented [by Appellants] remain unrebutted." *Jameson*, 75 F.3d at 1531 (citations omitted). We must avoid weighing conflicting evidence or making credibility determinations. Rather, " '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.' " *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 918 (11th Cir.1993) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). After a painstaking review of the entire record, we find that Appellants have made this requisite showing.

First, circumstantial evidence was presented of Soto's discriminatory animus towards older store managers under his direct supervision. Within a one-year period, four older, highly experienced store managers, out of a total of seven managers under Soto's direct supervision,

were terminated or demoted, and each was replaced by an employee under forty years old. In addition, Soto also terminated a highly experienced, older assistant store manager, during this time period, and replaced him with an employee under forty years old. As Soto conceded, "[I]t certainly turns out that what has occurred is that older managers were either fired or demoted and replaced by younger people," and that "in every instance . . . the older store managers had more years of experience than the people that replaced them." While not direct evidence of discriminatory animus, we believe that this pattern of firing and demoting so many older workers and replacing them with younger workers, by the relevant decision-maker during the same time period, constitutes probative circumstantial evidence of age discrimination. *See Stamey v. Southern Bell Telephone & Telegraph Co.*, 859 F.2d 855, 862 (11th Cir.1988). Moreover, the probative value of this pattern was underscored by direct testimony. Kanafani testified that, in January 1994, Fleming began placing advertisements for new store managers even though there were no managerial vacancies at the time. According to Kanafani, Harry Soto then began interviewing younger managerial candidates at Kanafani's store. Several of these candidates were later hired by Soto to replace Kanafani and the other older managers. Record evidence also reveals that shortly thereafter, older managers with good employment histories, under Soto's direct supervision, began receiving written reprimands for "poor store conditions" or "poor sales." Three former managers of Fleming, in addition to Damon, averred that they were demoted or terminated by Soto, after receiving written reprimands for "poor store

conditions," "poor performance," or "poor sales," and replaced by a substantially younger manager. Each former manager also disputed the veracity of their reprimands.

Second, Soto's remark to Kanafani's younger successor, D'Angelo, right after Kanafani was terminated, that Soto wanted "aggressive, young men" like himself to be promoted is highly suggestive circumstantial evidence from which a jury could infer discriminatory animus.[2] Far

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[2] D'Angelo twice averred that Soto used the term "aggressive young men," although D'Angelo, who still works for Fleming, later stated, under examination by defense counsel, that he was not sure whether Soto actually used the word "young." Kanafani also testified that D'Angelo told him that Soto had used the term "aggressive young men." The entire transcript of D'Angelo's testimony reads as follows:

Q. [Plaintiff's Attorney]: Did you ever have a one-on-one conversation with Harry Soto where Mr. Soto told you that what the company needed was aggressive young men like yourself to be promoted.

A. [D'Angelo]: Yes.

Q. Why don't you tell me how this conversation went?

A. This was right after Rick [Kanafani] was terminated and Harry had brought me up to the main office to explain to me that he had terminated Rick, and that the company was going in a new direction, and we had to hold onto our pants, was like the catch phrase at the time. Things were moving fast.

Q. That's when he told you that the company needed aggressive young men like yourself?

A. He included me in – I can't remember the exact word he used, but he included me in that mix, because I was in charge of the store for a week and a half until Tony Calaverio came in.

from being a stray remark, the comment may evince probative evidence of the state of mind of the decision-

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Q. But he did tell you that the company needed aggressive young men?

A. I can't recall that. I really can't.

Attorney: Could you read back to me my question?

(Thereupon, a portion of the record was read by the reporter as follows: Question: Did you ever have a one-on-one conversation with Harry Soto where Mr. Soto told you that what the company needed was aggressive young men like yourself to be promoted. Answer. Yes.) Q. Is that what happened?

[Objection to form]

A. Yes.

. . .

Q. [Defendant's Attorney]:. Do you have a recollection that these following words came out of Harry Soto, Harry Soto said the following words: We need aggressive young men like yourself? Do you have the recollection that he said that to you?

. . .

A. [D'Angelo]: It was something similar to that. It could be a paraphrase, so – I know aggressive was in there. He used me – I guess it was a motivational tool.

Q. Did he say the word "young"?

A. That, I can't recall.

Q. But you can recall that he said aggressive?

A. Aggressive, yes, yes, aggressive.

Q. And he included yourself?

A. Yes.

Q. But you're not sure if he said young?

A. I'm not sure about that.

We are satisfied that a jury should weigh the credibility of this circumstantial evidence. *See Walker v. NationsBank*, 53 F.3d 1548, 1563 (11th Cir.1995) (Johnson, J. specially concurring) (noting that "the factfinder must evaluate the credibility of the

maker at the time of Kanafani's termination. The comment also arguably suggests that Soto had an ageist preference for young managers. Given the substance, context, and timing of Soto's comment, if credited, we find it to be a significant piece of circumstantial evidence. *See Jones v. Bessemer Carraway Medical Ctr.*, 151 F.3d 1321, 1323 n. 11 (11th Cir.1998) (holding that "language not amounting to direct evidence, but showing some racial animus, may be significant evidence of pretext once a plaintiff has set out a prima facie case") (emphasis added); *see also Rayonier*, 188 F.3d at 1286 (finding decision-maker's comment that he wanted "younger" employees to constitute circumstantial evidence of a discriminatory motive); *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1499 (11th Cir.1991) (finding remark by supervisor to plaintiff that he had "been around too long and [was] too old and [was] making too much money" immediately after a "corrective interview" to be circumstantial evidence of age discrimination). Moreover, we also find Soto's statement to be probative as to whether age animus motivated the decision to terminate Damon because the remark (1) was allegedly made only three months after Damon was terminated, (2) immediately followed the termination of someone similarly situated to Damon and in the same protected class, and (3) came from the same decision-maker responsible for Damon's termination. *See Ryder v.*

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witnesses and the weight of the evidence. This task is peculiarly the province of the jury.") (*citing Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir.1988)); *see also Combs*, 106 F.3d at 1530 (stating, in the summary judgment context, that "[i]ssues of fact and sufficiency of evidence are properly reserved for the jury") (citation omitted).

Westinghouse Electric Corp., 128 F.3d 128, 130-133 (3d Cir.1997) (holding that remarks made one year after termination, and not directly about plaintiff, could be taken by a jury as an accurate reflection of the existing managerial attitude toward older workers) (emphasis added).

In addition to this circumstantial evidence, we conclude that Appellants have offered evidentiary support by which a reasonable jury could conclude that the specific reasons for termination given by Fleming were a pretext. Appellants both were terminated for alleged violations of company work rules. On summary judgment, we have written that the "work rule" defense is arguably pretextual when a plaintiff submits evidence (1) that she did not violate the cited work rule, or (2) that if she did violate the rule, other employees outside the protected class, who engaged in similar acts, were not similarly treated. *See Alphin*, 940 F.2d at 1501 n. 1 (*citing Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224 (11th Cir.1982)). We are satisfied that Appellants have made this requisite showing.[2]

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[2] Of course, this framework is simply used to assess whether a plaintiff has presented sufficient evidence to establish pretext – that is, the employer has not given an honest explanation of the employer's behavior – and thereby reach a jury on the ultimate question of discrimination. This framework, however, does not vitiate a plaintiff's ultimate burden to prove by a preponderance of the evidence that an employer terminated the plaintiff based on a discriminatory motive. An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct. An employer " 'may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not

With respect to Damon, Fleming contends that Damon was fired for poor performance; specifically, that over a six month period his store was cited by Fleming management on four separate occasions for "poor conditions." Damon flatly denies these allegations, and has adduced sufficient evidence to create a genuine dispute of material fact as to his job performance.

The first set of relevant allegations involve a February 24, 1994 visit by Soto to Damon's store. According to Damon, he and Soto discussed the store's overall appearance during the visit, but Soto never stated that conditions were below acceptable company standards. However, a week later, on March 4, 1994, Soto issued a written reprimand to Damon for store conditions in violation of company policy. According to Damon, Soto ordered him to sign the reprimand even though he did not agree with the reprimand's charges. Damon also averred that his store was in good condition on February 24, 1994, that the letter was a "fabrication," and that at no time prior to the reprimand did Soto tell him that store conditions were unacceptable. The reprimand gave Damon until March 15 to correct the violations. Soto conducted a follow-up store inspection on March 12, 1994. In an internal memo of the same day, which apparently was never shown to Damon, Soto found several uncorrected store violations. However, Soto subsequently testified that, by March 15, all of the store's violations had been fixed by Damon. Indeed, Soto admitted that Damon's ability to bring his store into compliance

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for a discriminatory reason.' " *Jones*, 151 F.3d at 1324 n. 16 (*quoting Nix*, 738 F.2d at 1187) (emphasis added).

showed impressive managerial drive. For the next few months, Damon received no reprimands.

On May 30, 1994, during Memorial Day Weekend, Mel Beech, Fleming's Vice President of Store Operations and Soto's direct supervisor, visited Damon's store. On June 9, 1994, ten days after this visit, Damon received a written reprimand from Soto for conditions allegedly found at the store during Beech's visit. The reprimand charged that Damon had been warned previously about performance improvements expected from him, that Damon was not performing consistently enough to continue in his position, and that any further operational problems would result in Damon's immediate termination. Damon disputes that the store was in poor condition during Beech's visit, and denies every single specific criticism contained in the June reprimand, save one minor point.[3] Damon also reiterates that the memorandum was a "fabrication" designed to justify his eventual firing, and that other older store managers in Soto's district received similar letters threatening to terminate or demote them, while he knew of no younger manager who received a similar letter.[4]

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[3] Of eight specific criticisms, Damon only conceded that three clerks may have been taking a break in the back room for a portion of Beech's visit. Among other things, he disputes that the meat and seafood cases were empty, that there were miscellaneous floor displays all over the store, that there was poor signage, that floor conditions were deplorable, and that there was poor customer service.

[4] Damon testified that he personally spoke to several older managers about their receipt of threat-to-terminate memos in 1994. He also stated that he spoke to several of the younger

Finally, on July 1, 1994, at the start of the busy July 4th weekend, Soto revisited Damon's store, and filed another reprimand of Damon. Five days later, Soto terminated Damon, by letter, for poor performance. Damon disputes the specific allegations of his store's poor condition, contained in the July reprimand, as well as Soto's claim that he had given Damon repeated verbal warnings about his alleged performance deficiencies. Moreover, Damon asserts that, Soto told him in the course of direct conversations, that he was doing a good job, and that his store's conditions had improved since Damon had become store manager. Damon also avers that he visited the stores of younger store managers and found that their stores were either in the same or worse shape during this relevant time period. None of these younger managers were terminated. Damon's testimony is corroborated by Julio Nunez, a former Fleming manager promoted by Soto, who testified that Damon's store was essentially in the same condition as the rest of Fleming's South Florida stores during the relevant time period. Additionally, Soto also conceded that two of Damon's three reprimands for "poor store conditions" occurred during busy holiday weekends – a time, according to Soto, when stores may well be in poor condition. Finally, evidence was presented that Luis Requejo, Damon's younger replacement, experienced substantially more severe problems in maintaining proper store conditions, and yet, was not fired. In addition to receiving two performance reprimands from

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managers, including Dave Applebaum, who denied receiving similar letters despite the fact that their stores were kept in similar condition to Damon's store.

Soto in August and October 1994, Requejo's meat department received several reprimands from state food inspectors beginning in July 1995, one month after Soto was promoted to another company position. Eventually, Requejo's meat department was shut down for failure to comply with these state reprimands. Although Soto admitted that this problem was more serious than Damon's alleged deficiencies, Fleming took no disciplinary action against Requejo.

Based on the totality of this evidence, the age-based comment allegedly made by Soto to Kanafani's replacement, and Soto's purported pattern of demoting and firing numerous older managers in favor of younger replacements, we conclude that Damon has introduced sufficient evidence to avoid summary judgment on his age discrimination claim.

We draw a similar conclusion with respect to Kanafani's claim. The sole reason advanced by Soto, the actual decision-maker, for Kanafani's termination is a yelling incident involving Kanafani and his seafood department manager on October 1, 1994.[5] Dennis D'Angelo, Kanafani's replacement, also testified that Soto told him that

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[5] Fleming now claims, despite repeated statements by Soto, the decision-maker, during his deposition that Kanafani was fired solely because of his yelling vulgarities at an employee on the sales floor, that Kanafani also was terminated, in part, because of his "previous disregard of company rules and blatant unprofessionalism." As evidence, Fleming introduced a subsequent affidavit from Soto in its motion for summary judgment that somewhat broadens Soto's termination motives. In the affidavit, Soto claimed that he fired Kanafani after the yelling incident for his "failure to improve his people skills," "[his] disregard of company rules, and his blatant unprofessionalism." However, during his earlier deposition,

the only reason Kanafani was fired was because he yelled at a fellow employee on the sales floor. Fleming claims

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Soto unequivocally stated that the sole reason for Kanafani's termination was the yelling incident.

Q. What was the basis for his [Kanafani's] termination?

A. Using profanity on the sales floor where the customers were out in the open.

. . .

Q. Was he terminated because of poor store conditions or was he terminated because of using vulgarity on the sales floor in front of customers?

A. He was terminated for using vulgarity on the sales floor in front of customers.

Q. No other reason?

A. That was the reason for the termination.

. . .

Q. So again, the only reason he was terminated was for using vulgarity on the sales floor, correct?

A. That is correct.

Moreover, Dennis D'Angelo, Kanafani's replacement, also testified that Soto told him that Kanafani was fired solely because of the yelling incident. Based on the repeated statements by Soto during his deposition that he fired Kanafani solely for the yelling incident (as well as D'Angelo's corroboration of Soto's termination motive), we find that a jury could infer that the "inconsistencies" between Soto's deposition and affidavit may be evidence of pretext. *See Tidwell v. Carter Products*, 135 F.3d 1422, 1427-28 (11th Cir.1998) (*citing Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir.1995); *Howard v. BP Oil Co., Inc.*, 32 F.3d 520, 525 (11th Cir.1994)). Furthermore, Kanafani has produced sufficient evidence to create genuine issues of material fact as to his previous reprimands from Soto. Kanafani received three reprimands prior to the yelling incident for "poor sales," "poor store conditions," and an altercation with a beer vendor respectively. First, Kanafani testified that his store had become more

that Kanafani uttered several vulgarities on the sales floor, where customers could overhear, and that this breach of company policy justified his immediate firing five days later. Kanafani admitted that he yelled during the incident, but vehemently denies using any vulgarity aside from the word "hell" once.[6] Kanafani's testimony

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profitable since he became store manager, creating a genuine issue of material fact as to the first reprimand. Second, while Kanafani received a reprimand for "poor store conditions" during the busy Memorial Day Holiday Weekend, Fleming does not directly proffer this reprimand as a basis for Kanafani's termination. Even if this reprimand were cited as a termination factor, we believe Kanafani has presented sufficient evidence that the reprimand was a pretext. During Memorial Day weekend, Kanafani was on vacation, and not in charge of the store. Julio Nunez, a younger assistant manager at the time, actually was acting store manager for the weekend. Despite this fact, Kanafani, and not Nunez, was reprimanded for the store's "poor condition." Nunez subsequently was promoted to store manager by Soto, replacing an older store manager, despite Soto's admission that he was aware that Nunez, and not Kanafani, was primarily responsible for the poor store conditions during Memorial Day Weekend. Finally, Kanafani vigorously denies that he upbraided the beer vendor over complimentary football tickets offered to him, or told the vendor "deliver better tickets or else." All Kanafani admits to is politely returning the tickets because they were not to his satisfaction, creating a genuine issue of material fact as to this incident. We believe that this evidence, when combined with all of the previously-cited circumstantial evidence, could convince a jury that Kanafani's reprimands were a pretext for his termination.

[6] Fleming asserts that Kanafani used the word "fuck" several times during the incident. Kanafani denies this claim, admitting only to stating at the end of the incident, "what the hell do you want me to do?"

creates a genuine issue of material fact with respect to whether he uttered profanities on the sales floor.

In addition, Kanafani also presented evidence which, if credited, could convince a jury that the incident was a pretext for his termination. Kanafani's replacement, Dennis D'Angelo, testified that he had observed members of Fleming management, including Soto himself, yell at employees in front of store customers. Soto admitted to yelling at employees with profane language, but claimed these incidents occurred in employee-only store areas. Previously, we have held that evidence demonstrating that the decision-maker engaged in the same policy violation proffered for an employee's termination is "especially compelling" evidence of pretext. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir.1998). As a result, if a jury were to credit D'Angelo's testimony, they could reasonably find the yelling incident to be a pretext. When this testimony is combined with Soto's comment to D'Angelo, immediately after Kanafani's termination, that Soto wished to promote "younger aggressive men," and Soto's pattern of demoting and firing numerous older managers in favor of younger replacements, we conclude that Kanafani too has introduced sufficient circumstantial evidence to survive summary judgment.

In short, we find that the circumstantial evidence presented by Damon and Kanafani, taken as a whole, is sufficient to make a prima facie showing of age discrimination, and to rebut the nondiscriminatory reasons proffered by Fleming for their terminations. Material facts remain in dispute, precluding summary judgment.

Accordingly, we reverse the district court's order of summary judgment and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-230-CIV-LENARD

WALTER DAMON and **RICHARD KANAFANI,**

Plaintiffs,

vs.

FLEMING SUPERMARKETS OF FLORIDA, INC. d/b/a HYDE PARK MARKETS, f/d/b/a WOOLEY'S FINE FOODS, a Florida corporation,

Defendant.

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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 16, 1998)

THIS CAUSE came before the Court on Defendant's Motion for Summary Judgment (DE33) filed on May 1, 1998. The Court having considered the motion and the response and reply thereto, and otherwise advised in the premises, finds as follows.

I. INTRODUCTION

Plaintiffs Richard Kanafani ("Kanafani") and Walter Damon ("Damon") are former store managers of Hyde Park Market retail grocery stores. Damon and Kanafani became store managers in 1963 and 1981, respectively.

Defendant Fleming Supermarkets of Florida, Inc. ("Fleming") owns and operates the Hyde Park Market chain of retail grocery stores which it fully acquired in September of 1993. Fleming fired Damon on July 6, 1994, and later fired Kanafani on October 6, 1994. Damon and Kanafani filed the above-captioned action on January 28, 1997, alleging that Fleming violated the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C.A. §§ 621-34 (West 1985 & Supp. 1998), and the Florida Civil Rights Act ("FRCA"), Fla. Stat. Ann. §§ 760.01-760.11 (West 1997 § Supp. 1998),[1] when it terminated them on the basis of their age. In its motion for summary judgment, Fleming argues that the Plaintiffs have failed to state a prima facie case of age discrimination. In addition, Fleming asserts that the Plaintiffs have not produced evidence of pretext sufficient to warrant a trial of this action. The Court has jurisdiction over this action pursuant to 28 U.S.C.A. §§ 1331, 1343 and 1367.

II. STANDARD ON SUMMARY JUDGMENT

On a motion for summary judgment, the court construes the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as

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[1] Claims brought under the FCRA are subject to the same analysis applicable in ADEA cases. *See Florida Dep't of Community Affairs v. Bryant*, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court explained the summary judgment standard as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *see also Barfield v. Brierton*, 883 F.2d 923, 933 (11 Cir. 1989). The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the non-moving

party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(e). In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." *Matsushita*, 475 U.S. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita*, 475 U.S. at 587. *See also Anderson*, 477 U.S. at 249.

III. ANALYSIS

"In an unlawful age discrimination case, the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that age was a determining factor in the employer's decision to dismiss him." *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1457 (11th Cir. 1997) (citing *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993)). "In order to survive a motion for summary judgment, the plaintiff must first establish a prima facie case of age discrimination." *Id.* "This may be accomplished by presenting direct evidence of discriminatory intent, such as age-biased statements made by the decision maker, *see Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990); by presenting circumstantial evidence which complies with the test set forth by the Supreme

Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or by presenting a statistical pattern of discrimination, *Earley*, 907 F.2d at 1081." *Id.* "Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge." *Id.* (citing *Clark*, 990 F.2d at 1227). "If the employer does so, the burden shifts back to the plaintiff to 'introduce significantly probative evidence showing that the asserted reason is merely a pretext for discrimination.' " *Id.* (citing *Clark*, 990 F.2d at 1228). In response to Fleming's motion for summary judgment, the Plaintiffs argue that the record contains both direct and circumstantial evidence sufficient to make out a prima facie case of age discrimination.

A. Direct Evidence

"Direct evidence is evidence which, if believed, proves the existence of the fact in issue without inference or presumption." *Jones v. Bessemer Carraway Med. Ctr.*, No. 97-6076, 1998 WL 526406, at *3 n.11 (11th Cir. Aug. 24, 1998). "So, direct evidence of discrimination is powerful evidence capable of making out a prima facie case essentially by itself." *Id.* Stray remarks in the workplace, statements by nondecisionmakers and statements by decisionmakers unrelated to the decisional process itself do not constitute direct evidence. *See Evans v. McClain of Georgia Inc.*, 131 F.3d 957, 962 (11th Cir. 1997) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)).

The Plaintiffs first argue that the following deposition testimony of District Manager Harry Soto, who fired

Damon and Kanafani, constitutes direct evidence of age discrimination:

> Q. It certainly turns out that what has occurred is that older managers were either fired or demoted and replaced with younger people; correct?
>
> A. That's correct.
>
> Q. And I think in every instance that we've discussed today the older store managers had more years of experience than the people that replaced them; correct?
>
> A. That's correct.

(Soto Dep. at 287.) Soto's testimony that the result of the terminations and demotions that took place was the replacement of older employees with younger individuals, however, does not prove that age discrimination caused such result. As such, Soto's testimony is not direct evidence. Next, the Plaintiffs assert that Fleming employee Dennis D'Angelo's testimony with respect to a comment made to him by Soto constitutes direct evidence of age discrimination:

> Q. Did you ever have a one-on-one conversation with Harry Soto where Mr. Soto told you that what the company needed was aggressive young men like yourself to be promoted?
>
> A. Yes.
>
> Q. Why don't you tell me how this conversation went?
>
> A. This was right after Rick [Kanafani] was terminated and Harry had brought me up to the main office to explain to me that he had terminated Rick, and that the company was going in a

new direction, and we had to hold onto our pants, was like the catch phrase at the time. Things were moving fast.

Q. That's when he told you that the company needed aggressive young men like yourself?

A. He included me in – I can't remember the exact word he used, but he included me in that mix, because I was in charge of the store for a week and a half until Tony Calaverio [Kanafani's replacement] came in.

Q. But he did tell you that the company needed aggressive young men.

A. I can't recall that. I really can't.

(D'Angelo Dep. at 16-17.) D'Angelo then reaffirmed his initial response to counsel's question that Soto had made such statement to him. *Id.* at 18. However, during cross-examination, D'Angelo retreated from his testimony that Soto had used the word "young":

Q. Do you have a recollection that these following words came out of Harry Soto, Harry Soto said the following words: We need aggressive yong [sic] men like yourself? Do you have the recollection that he said that to you?

A. It was something similar to that. It could be a paraphrase, so – I know aggressive was in there. He used me – I guess it was a motivational tool.

Q. Did he say the word "young"?

A. That, I can't recall.

Q. But you can recall that he said aggressive?

A. Aggressive, yes, yes aggressive.

(D'Angelo Dep. at 33.) Thus, D'Angelo testified that Soto used the word "aggressive" but did not recall whether he had used the word "young." As a result, the Court finds that such statement does not constitute direct evidence of age discrimination because although said by the relevant decisionmaker, it was not said in the context of Kanafani's termination. *See Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) (finding similar comments "not directly probative of an intent to discriminate"). Finally, the Plaintiffs assert that the following testimony of former Hyde Park Market store manager Charlie Guerra contains direct evidence of age discrimination:

> Q. Did you ever have the opportunity to hear Mr. Soto make any type of remark which could be considered derogatory to older individuals?
>
> A. I did not hear this myself, but I was told by a young – by another employee of the Store Number 9, when Julio Nunez was given the management position in the Store Number 9, Mr. Soto held a meeting and he mentioned at the meeting that we need a younger influx of blood in this company.
>
> Q. And just so I'm clear, it's your understanding that at a store managers' meeting, Mr. Soto said at this meeting, and I will quote: "We need a younger influx of blood in the company;" is that correct?
>
> A. It was not in a store managers' meeting. It was in a store meeting.
>
> Q. Let me see if I understand that correctly then. So it's your understanding that at a point in time when Mr. Nunez had assumed the store manager position at Store Number 9, during a

> store meeting Mr. Soto said the following: "We need a younger influx of blood in the company"? Is that correct, sir?
>
> A. That is more or less correct, the words that I was told that Mr. Soto mentioned at that meeting.
>
> Q. Do you know the names of the individuals who were present at this meeting?
>
> A. No, I don't know. The only person that mentioned this to me, his name is Justo, who was I do believe, the grocery manager or grocery clerk at that particular time.

(Guerra Dep. at 36-37.) Soto allegedly made this statement shortly after Damon's termination. However, although made by Soto, the relevant decisionmaker, like the statement discussed above, it was not made in the context of Damon's termination and therefore does not constitute direct evidence of age discrimination. Finally, Produce Supervisor Sam Bell's identification of Damon as "Pops", *see* Damon Dep. at 106-07, does not constitute direct evidence because Bell was not a decisionmaker with respect to Damon's termination and he did not make the comment in the context of Damon's termination. In sum, the evidence relied on by the Plaintiffs as direct evidence cannot be so characterized, and the Court must therefore determine whether they have instead made out a prima facie case of age discrimination based upon circumstantial evidence.

B. Circumstantial evidence

"In an ADEA case involving discharge, demotion, or failure to hire, a plaintiff may establish a prima facie case by showing: (1) that he was a member of the protected group of persons between the ages of forty and seventy;[2] (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position he sought or from which he was discharged; and (4) that he was qualified to do the job for which he was rejected." *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998) (citing *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996); *Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir. 1996)). Fleming does not dispute that the Plaintiffs can satisfy the first two (2) elements of the prima facie case.[3] Fleming argues, however, that neither of the Plaintiffs have produced evidence that they were qualified for the store manager positions that they held at the time of their termination[4] and that

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[2] In 1986, Congress amended the age requirement of the ADEA to require only that plaintiffs be older than forty (40) years of age, eliminating the requirement that plaintiffs be younger than seventy (70) years old. *See* Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342, 3344 (1986).

[3] It is undisputed that both Damon and Kanafani were over forty (40) at the time of their terminations in 1994. *See* 29 U.S.C.A. § 631(a) (West Supp. 1998).

[4] Although the Plaintiffs assert that the "Defendant is not disputing that Damon has clearly satisfied his prima facie case," *see* Pls.' Resp. at 8 n.5, the Defendant argued in its brief that "Kanafani and Damon received written and verbal reprimands relating to their job performance and their inability to perform as store manager under the new standards instituted by Fleming supermarkets," *see* Def.'s Mot. Summ. J. at 12-13.

Kanafani failed to produce evidence on the fourth element.

In *Turlington*, the Eleventh Circuit noted that "a plaintiff seeking to establish a prima facie case under the ADEA must show only that he was qualified to do the job for which he was rejected, *see Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir. 1996), and, unlike a Title VII plaintiff, need not show that a person outside of the plaintiff's class with equal or lesser qualifications received the job, *cf. Roberts v. Gadsen Memorial Hospital*, 835 F.2d 793, 796 (11th Cir. 1988)." 135 F.3d at 1433. "In this circuit, the [qualified element] may be established by evidence that the plaintiff has performed her responsibilities for several years without complaint." *Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1520 (11th Cir. 1990) (citing *Stanfield v. Answering Service Inc.*, 867 F.2d 1290, 1293 (11th Cir. 1989)).

Subsequent to Fleming's takeover of the store managed by Damon in September of 1993, Damon received several written warnings. On November 24, 1993, the Metro-Dade County Consumer Services Department issued a "Compliance Status Report" to Damon indicating that eighteen (18) packages of turkeys weighed less than the weight stated on the labels and that packages of poultry did not contain grading information. (Damon Dep. at Ex. 1.) In addition, the report indicated that seventy-five percent (75%) of the meat case items contained extended shelf life dates. *Id.* On March 3, 1994, Damon received a memorandum from Soto indicating that during a walk through of Damon's store on February 24, 1994 he found that sale signs for the current week had not been put up in the produce and meat departments,

that there were holes in several sections, that the canopy tops were a total mess, and that the store was dirty "in many areas that were very visible to the customer." (Damon Dep. at Ex. 2.) Soto further stated: "Walter, we have spoken about store cleanliness on many occasions and about the importance of cleaning up our act to keep the customers we have, as well as get new ones." *Id.* Soto further stated that "[t]he conditions in [Damon's] store were totally unacceptable and will not be tolerated," indicating that Damon would be terminated if six (6) items outlined in the memorandum were not addressed and corrected by March 15, 1998. *Id.* A letter to the file indicated that a subsequent walk through conducted on March 12, 1994 revealed that Damon had not followed through on several of the items listed in the March 3, 1994 memorandum. (Damon Dep. at Ex. 3.) On June 9, 1994, Soto again informed Damon by memorandum that a walk through of Damon's store on May 30, 1994 revealed that (1) "[s]ervice meat was empty except for a couple of dark steaks," (2) [s]eafood case was empty," (3) "[t]hree clerks from respective departments were in the back room taking breaks," (4) "[m]erchandising was non-existent," (5) "[m]iscellaneous floor displays all over the floor," (6) "[p]oor signage," (7) "[f]loor conditions were deplorable," and (8) "[p]oor customer service." (Damon Dep. at Ex. 4.) Soto further indicated that "we find it necessary at this time to let you know any further operational problems will result in immediate termination." *Id.* On July 5, 1994, Soto wrote a memorandum to Human Resources employee Steve Abernathy in which he indicated several problems discovered during a July 1, 1994 walk through

of Damon's store and recommended that Damon be terminated. (Damon Dep. at Ex. 7.) On July 6, 1994, Soto indicated by memorandum to Damon:

> At the beginning of 1994 the company began to take a direction regarding the type of company we wanted to become, and had several meetings with the store managers on things that needed to be done to get us going in the right direction.
>
> Within the last five months you have been spoken to on many occasions regarding your job performance, and have also been documented on March 3rd and June 9th on specific issues. The follow through on your part has been inconsistent in the areas we've addressed and find it necessary at this time to terminate your employment with the company.

(Damon Dep. at Ex. 8.)

During his deposition, Damon disputed the truth of some of the contents of the memoranda provided to him by Soto by asserting that they were "made out just to eliminate [his] position with the company." Damon Dep. at 23; *see also id.* at 25, 35. He also agreed that some and denied that other of the conditions reported in the memoranda were accurate with respect to his store. Thus, it is undisputed that Damon failed to perform at least some of his duties to the standards imposed by Fleming. In addition, Damon could not recall any actions of members of Fleming's management indicative of bias on the basis of age, other than to state that Soto "seemed to pick on the older store managers and treated the younger store managers quite differently than he treated the older store managers" and that he was "jovial when talking to them,

making jokes with them, and friendly to them, warm, added some warmth to his voice." Damon Dep. at 75-76; *see also id.* at 78.

Subsequent to Fleming's takeover of Kanafani's store in September of 1993, Kanafani received several written warnings. On February 8, 1994, Soto wrote in a memorandum to Kanafani:

> we are losing tremendous sales in this store. It seems that customer dissatisfaction is running high in your store, as evidenced by the letters and calls received at this office. . . . If the behavior and attitude of this store continues to cost us customers, I will not have any choice but to take disciplinary action up to and including termination.

(Kanafani Dep. at Ex. 2.) On June 9, 1994, Soto reported by memorandum to Kanafani that he observed the following during a May 30, 1994 walk through: (1) "[s]ervice counter was not customer friendly, dirty," (2) "[d]eli department was low and not fresh," (3) "[b]akery department was almost empty – no variety," and (4) "[t]oo many excess displays around the store wine section, card section in particular." (Kanafani Dep. at Ex. 3.) Soto stated further:

> We have had conversations about the clutter in certain ares [sic] of the store in the past, and how we need to keep the floors clear. . . . If you cannot make the necessary decisions that need to be made in your store, I will have to find someone who will. . . . Any future incidents will result in immediate termination.

Id. On September 6, 1994, Soto wrote to Kanafani concerning an incident where Kanafani refused to take football tickets offered to him by one of the store's vendors because the seats were not to his liking. (Kanafani Dep. at Ex. 4.) On October 4, 1994, Soto terminated Kanafani after an incident during which Kanafani, acting out of frustration, yelled at Seafood Manager Grant White in front of customers in his store on October 1, 1994. Soto indicated by memorandum that he had "expressed to [Kanafani] in past conversations that [he] must learn how to handle [himself] more professionally and make management decisions as the Store Manager." (Kanafani Dep. at Ex. 5.) Soto further stated: "Rick, you have not responded to this directive as evidenced by this outburst in your Store, and I find it necessary at this time to terminate your services with the company." *Id.* Indeed, "[d]iscourteous treatment toward . . . co-workers" constituted a basis for disciplinary action under Fleming's rules. (Kanafani Dep. at Ex. 1.)

In his deposition, Kanafani disputed the points raised by Soto in the memoranda. However, he also agreed that he had been spoken to with respect to his lack of professionalism in the past and that he had handled the vendor issue in the way discussed by Soto in his memorandum of September 6th. Thus, it is undisputed that Kanafani failed to perform to at least some of the standards imposed by Fleming. Like Damon, Kanafani could not point to particular actions indicating age discrimination on the part of members of Fleming's management.

Fleming also asserted in its motion that Kanafani is unable to make out a prima facie case because he is

unable to show that he was replaced by someone "substantially younger." At the time of his termination, Kanafani was forty-two (42) years old. (Kanafani Dep. at 66.) His replacement, Tony Calaverio, was thirty-seven (37) years old. (Soto Dep. at Ex. 5.) In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Supreme Court indicated that a plaintiff cannot proceed beyond the prima facie case where his replacement is not "substantially younger" than himself. 517 U.S. at 312. Although this Circuit has not set forth guidelines for what age disparity satisfies the "substantially younger" element in response to *O'Connor, but see Carter v. Decisionone Corp.*, 122 F.3d 997, 1003 (11th Cir. 1997) (relying on pre-*O'Connor* case *Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir. 1989) and finding three (3) year disparity sufficient), other circuits have found a five (5) year disparity insufficient. *See, e.g., Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 1141 (7th Cir. 1998) (ten (10) year disparity required); *Wellman v. Wheeling and Lake Erie Ry. Co.*, No. 97-3084, 1998 WL 25005, at **4 (6th Cir. Jan. 12, 1998) (five (5) years younger not "substantially younger"); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1413 (8th Cir. 1997) (same).

Given that the "plaintiff's burden in proving a prima facie case is light," *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432, 1434 (11th Cir. 1998) (citing *Isenbergh v. Knight-Ridder Newspaper Sales Inc.*, 97 F.3d 436, 439 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997)), and that "[w]e 'generally . . . eschew[ ] an overly strict formulation of the elements of a prima facie case, particularly in age discrimination cases,' " *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 851 (11th Cir. 1997) (quoting *Jameson v.*

Arrow Co., 75 F.3d 1528, 1531 (11th Cir. 1996)), the Court will consider the other evidence produced by the Plaintiffs to determine whether such evidence forms the basis for an inference that age played a factor in the Defendant's decision to terminate them. *See Clark v. Coats & Clark Inc.*, 990 F.2d 1217, 1226-27 (11th Cir. 1993) (stating that the prima facie case requirements "are not . . . interpreted strictly if the plaintiff can otherwise provide a basis for the inference that age was a factor in the employment decision" and citing *Mitchell v. Worldwide Underwriters Ins. Co.*, 967 F.2d 565, 567 (11th Cir. 1992)) (footnote omitted).

First, the Plaintiffs rely on the comment evidence which they characterized as direct evidence. The Court found above that the alleged statements of Harry Soto and the excerpt of his deposition testimony did not constitute direct evidence. *See supra* at 7-11. With respect to Soto's deposition testimony to the effect that the result of certain terminations and demotions at Fleming has been to replace older more-experienced managers with younger less-experienced individuals, the Court finds that such testimony does not constitute circumstantial evidence which in and of itself suffices as a basis for an inference of age discrimination. Similarly, Soto's comment to D'Angelo concerning the company's need to promote aggressive men is not probative of age discrimination. Rather, it is a "facially neutral" comment which was not applied directly to Kanafani. *See Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988). As the *Young* court stated, such comment "regarding . . . aggressiveness, enthusiasm, and vigor [is] hardly surprising" in

light of the competitive nature of the retail grocery business. *Id.* With respect to Soto's comment regarding the need for a "younger influx of blood," the Court finds that such a comment may seem probative of age discrimination at first blush. However, assuming that the comment was made, which is not at all clear,[5] the Court finds that the context in which the comment was made was not sufficiently fleshed out in the record to reveal the discriminatory nature of the comment.

IV. CONCLUSION

In sum, the Court has considered the record as submitted in its entirety[6] and cannot find that the Plaintiffs have made out a prima facie case of age discrimination under the ADEA in that the evidence presented does not result in the necessary inference. Even if the Court assumed that the record supports such an inference, the Court cannot find that the record also contains evidence of pretext and/or evidence creating a triable issue as to the Defendant's proffered explanations for its termination of the Plaintiffs. Based on the foregoing, it is hereby

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[5] As stated *supra* pp. 9-10, former Hyde Park Market store manager Charlie Guerra testified that an employee named Justo relayed the comment at issue to Guerra. With its reply, however, Fleming provided an affidavit of Justo Varela in which he denied both having heard and repeated the comment to Guerra. (Def.'s Reply at Ex. A, ¶ 3.)

[6] As part of its consideration of the record, the Court has specifically examined the "pretext evidence" set forth at pages 13 through 19 of the Plaintiff's Response and finds that such evidence is insufficient.

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment be **GRANTED**. All other pending motions are **DENIED AS MOOT,** and the Clerk shall close this case forthwith. It is further

ORDERED AND ADJUDGED that the Defendant shall file a proposed final judgment within seven (7) days of the date of this Order.

DONE AND ORDERED in Chambers in Miami, Florida, this 16 day of September, 1998.

/s/ Joan A. Lenard
JOAN A. LENARD
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Supreme Court, U.S.
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No. 99-1456

IN THE

Supreme Court of the United States

FLEMING SUPERMARKETS OF FLORIDA, INC.,

Petitioner,

v.

WALTER DAMON and RICHARD KANAFANI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals, on the facts before it, properly ruled that the Respondent, Richard Kanafani, had established a *prima facie* case of Age Discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), given the plethora of circumstantial evidence of age discrimination presented by him in the record independent of the fact that his replacement was five years younger than him.

PARTIES TO THE PROCEEDING

The Respondents, Walter Damon and Richard Kanafani, are individuals and were plaintiffs/appellants in the proceedings below. The petition only raises issues applicable to Richard Kanafani and does not raise any issues as to Walter Damon.

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STATEMENT OF THE CASE

On January 28, 1997, Respondents, Walter Damon, ("Damon"), and Richard Kanafani, ("Kanafani"), former employees of Fleming Supermarkets of Florida, Inc., ("Fleming"), filed suit against Fleming for Age Discrimination in the United States District Court for the Southern District of Florida pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, and the Florida Civil Rights Act of 1992, Fl. Stat. Ann. §§ 760.01-760.11. *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1357 (11th Cir. 1999). Specifically, Damon and Kanafani alleged that they were both terminated from their positions as Store Managers of Fleming's supermarket chain, Hyde Park Markets, because of their age. *Id.* at 1358.

On May 1, 1998, Fleming moved for summary judgment. On September 16, 1998, the district court granted Fleming's motion for summary judgment and made various conclusions of law. *Id.* at 1358. Specifically, the district court found that 1) Damon and Kanafani did not establish that they were qualified for their positions under the four-part test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), 2) Damon and Kanafani did not present direct evidence of age discrimination, and 3) that Damon and Kanafani did not establish that the reasons offered by Fleming were pretextual for age discrimination. *Id.* at 1358. The district court also suggested in *dicta* that Kanafani had failed to establish that he was replaced by someone substantially younger because at the time of his termination, he was 42 years old and his replacement was 37 years old. *Id.*

Damon and Kanafani appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit. On December 3, 1999, the Eleventh Circuit reversed the district court, holding that both Damon and Kanafani met their *prima facie* burdens and presented sufficient circumstantial evidence rebutting the nondiscriminatory reasons proffered by Fleming. *Id.* at 1359-65. The Eleventh Circuit remanded the case to the district court where it is currently awaiting trial.

REASONS FOR DENYING THE WRIT

The question presented in this case has no implication beyond the facts of this case. There is no fundamental principle of federal law at stake or conflicting decisions to warrant issuance of a writ of certiorari. The Eleventh Circuit applied well-settled principles of law to the facts in the record; the petitioner simply disagrees with the Circuit Court's decision. Specifically, this petition seeks review by this Court of the Eleventh Circuit's decision reversing the district court's granting of final summary judgment in favor of petitioner. Fleming contends that the Eleventh Circuit erred in holding that the five year age difference between Kanafani and his replacement sufficiently satisfied the "substantially younger" requirement of his *prima facie* case in light of this Court's holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). Fleming argues that this Court should adopt an overly strict application of the *McDonnell Douglas* test in discharge cases by setting forth an arbitrary age differential of ten years between an ADEA claimant and his replacement. Fleming's argument runs counter to well settled law which holds that the *McDonnell Douglas* requirements need not be interpreted in an overly strict manner if a plaintiff "can otherwise provide

a basis for the inference that age was a factor in the employment decision." *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993); *Mitchell v. Worldwide Underwriters Insurance Co.*, 967 F.2d 565, 567 (11th Cir. 1992); *Pace v. Southern Ry. System*, 701 F.2d 1383, 1386-87 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983).

While the *McDonnell Douglas* requirements are useful to test whether older employees were treated differently from younger employees, they are not the exclusive means by which a plaintiff can establish a *prima facie* case of age discrimination. Fleming's suggestion that this Court should set an arbitrary age limit between a plaintiff and his replacement requires the Court to overreach its authority by placing an additional burden on a plaintiff which Congress did not intend. Fleming's argument would create an absolute bar to any age discrimination claim where the age differential is less than ten years, (or some other arbitrary number exceeding five years), even if the record is replete with circumstantial evidence of age discrimination. While there is some merit to the argument that the greater the number of years between a claimant and his younger replacement, the greater the inference of age discrimination, this argument falls far from requiring an arbitrary age difference to satisfy a *prima facie* case. Courts must look to the record in its entirety on a case-by-case basis to determine whether a *prima facie* case has been satisfied.

In the instant case, notwithstanding the fact that Kanafani's replacement was five years younger than him, the record was replete with circumstantial evidence of age discrimination which the Eleventh Circuit found was sufficient to reverse the summary judgment and remand the case for trial. For example, evidence was presented of the

decisionmaker's discriminatory animus towards older store managers under his direct supervision in that within a one-year period, "*four* older, highly experienced store managers, out of a total of *seven* managers under [the decisionmaker's] *direct supervision*, were terminated or demoted, and each was replaced by an employee under forty years old." *Damon*, 196 F.3d at 1361 (emphasis in original). In fact, the decisionmaker himself conceded that "what has occurred is that older managers were either fired or demoted and replaced by younger people, and that in every instance . . . the older store managers had more years of experience than the people that replaced them." *Id.* There was additional evidence that Fleming had been placing ads for new store managers even though there were no available store manager vacancies. *Id.* Ultimately, these new hires turned out to be the younger less experienced managers who replaced the older more experienced managers, including Kanafani. *Id.* Furthermore, the same decisionmaker made a remark to Kanafani's younger successor right after Kanafani was terminated, that he wanted "aggressive, *young* men" like himself to be promoted. *Id.* at 1362 (emphasis in original). The Eleventh Circuit correctly held that this comment was "highly suggestive circumstantial evidence from which a jury could infer discriminatory animus . . . Far from being a stray remark, the comment may evince probative evidence of the state of mind of the decision-maker at the time of Kanafani's termination." *Id.* Finally, Kanafani presented additional evidence that younger employees were not subjected to the same punishment as older employees for violation of the company's work rules. *Id* at 1363-64. Notwithstanding the five year disparity between Kanafani and his replacement, as evidenced by the above, Kanafani presented ample evidence which is more than adequate to create an inference that Fleming's employment decisions regarding Kanafani were motivated by an unlawful ageist bias.

In its Petition, Fleming suggests that the Eleventh Circuit's holding was erroneous in light of this Court's decision in *O'Connor*. Specifically, Fleming relies upon this Court's language that:

> [i]n the age-discrimination context, such an inference of [illegal discrimination] cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

Id. at 312. Fleming's suggestion is wrong as it is predicated upon a misreading of *O'Connor*.

In *O'Connor*, this Court held that if the *McDonnell Douglas* test were applied to ADEA actions, one does not have to prove that they were replaced by someone outside the protected age group (40) in order to make out a *prima facie* case of Age Discrimination. 517 U.S. at 312-313. This Court opined that all a plaintiff need show is "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .'" *Id. quoting Teamsters v. United States*, 431 U.S. 324, 358 (1977). This Court never held that a plaintiff need show that he was replaced by someone at least ten years younger than him or some other arbitrary number. In fact, this Court reached the very same holding reached years earlier by the Eleventh Circuit in *Carter v. City of Miami*, 870 F.2d 578 (11th Cir. 1989), where the Eleventh Circuit

> declined to hold that a plaintiff's inability to show that he was replaced by someone under forty is an absolute bar to the establishment of *a* prima facie case . . . To the contrary, the establishment of a prima facie case is essentially a factual question particular to the circumstances of a given case . . . The inquiry is whether an ordinary person could reasonably infer discrimination if the facts presented remained unrebutted.

Carter, 870 F.2d at 583. It is without question that the *O'Connor* decision simply holds that in ADEA cases, one does not have to show that they were replaced by someone outside the protected age group. Fleming's argument that this Court should adopt an arbitrary age disparity, (which, not surprisingly must exceed five years, the age difference between Kanafani and his replacement), in order to state a *prima facie* case would simply turn the ADEA on its head.

In all disparate treatment actions, proof of discriminatory intent is an essential element of a plaintiff's *prima facie* case. Depending on the facts of a particular case, in some situations, as in the case *sub judice*, intent can be inferred from the "mere fact of differences in treatment." *Giles v. Ireland*, 742 F.2d 1366, 1374 (11th Cir. 1984); *accord Mitchell v. Worldwide Underwriters Insurance Co.*, 967 F.2d 565, 566 (11th Cir. 1992). Logically, the lesser the age disparity between an older employee and his younger replacement, the more likely that plaintiff will have to rely on additional circumstantial evidence of age discrimination in the form of anecdotal evidence or in the form of showing differences in treatment between older employees and younger employees.

Contrary to Fleming's position, there is no conflict between the circuits. The decisions relied upon by Fleming from the Seventh, Sixth, Eighth, and Fourth Circuits are not cases where the court was presented with a plethora of circumstantial evidence of age discrimination as was presented by Kanafani in the instant case. Each of the cases from those circuits and the instant case were all properly decided on their own unique set of facts. In the instant case, after considering the relevant facts and the applicable law, the Eleventh Circuit properly held that Kanafani presented a *prima facie* case of age discrimination and met his burden of presenting genuine issues of material fact mandating the reversal of summary judgment in favor of a trial by jury.

CONCLUSION

This case does not merit further review by this Court. Accordingly, for the foregoing reasons, Fleming's Petition should be **DENIED.**

Respectfully submitted,

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